

7 Official Opinions of the Compliance Board 36 (2010)

Exceptions Permitting Closed Sessions – Legal Advice – Exception, in combination with litigation exception, authorized closed meeting with counsel regarding litigation and delegation of settlement authority

Exceptions Permitting Closed Sessions – Litigation – Exception, in combination with legal advice exception, authorized closed meeting with counsel regarding litigation and delegation of settlement authority

Closed Session Procedures – Written Statement – Omitting specific statutory cite violated Act

Minutes – Closed Session Statement – Inadequate information violated Act

July 15, 2010

Kathryn Lating

The Open Meetings Compliance Board has considered your complaint alleging that the Havre de Grace City Council violated the Open Meetings Act when it “overturned a Board of Appeals decision ‘behind closed doors.’” For the reasons explained below, we find that the Council had a proper basis under the Open Meetings Act to consider the matters that were considered during closed sessions on October 19 and November 2, 2009. However, the Council failed to satisfy the Act’s requirements pertaining to the documentation required in connection with a closed session.

I

Complaint and Response; Supplemental Record

The complaint outlined the efforts of St. John’s Commons, Inc. to obtain conditional use approval and variances to operate a senior housing facility in the historic district of Havre de Grace. A historic preservation group and certain citizens have opposed the project.

According to the complaint, in June 2008, the Board of Appeals sided with the opponents. In August 2008, a revised building plan was presented and the Board of Appeals granted the necessary approvals. However, in June 2009,

the Circuit Court for Harford County overturned the Board of Appeals' action because the Court found that the Board had violated the Open Meetings Act when it deliberately prevented the public from hearing its deliberations when microphones were turned off and the Board deliberated "off the record." The matter was again considered by the Board of Appeals later in 2009 at which time the Board voted not to grant the necessary approvals for the project.

On November 13, 2009, St. John's Commons filed a lawsuit against the City under the federal Fair Housing Act and, on November 16, 2009, the City Council apparently settled with St. John's Commons which resulted in overturning the Board of Appeals' decision. The complaint indicated that the public became aware of the City's decision on November 27 through the local newspaper article. The complaint indicated that the decision to settle the litigation was not made in a public forum. Rather, "[i]t appears this decision may have been made at the end of [a] November 2, 2009 City Council meeting where [the Council] went off the record for legal advice"¹

In a timely response on behalf of the Council, Paul Ishak, City Attorney for Havre de Grace, explained that the City was put on notice of threatened litigation by St. John's Commons on September 22, 2009, through a letter sent to Acting Mayor Craig, and followed by letters sent to the municipal attorney on October 15 and 21, 2009. St. John's Commons claimed that the City violated the federal Fair Housing Act through its Board of Appeals' action when the previously approved project was denied a variance. The threatened suit claimed that the City had failed to provide a reasonable accommodation for the disabled. Mr. Ishak advised Acting Mayor Craig of time constraints imposed by the threatened litigation. The closed session was added to the publicly-available agenda for a regular Council meeting on October 19, 2009, which noted that the municipal attorney requested the closed session concerning St. John's Commons. During the closed session, we are told, the threatened complaint was discussed and the Council unanimously granted approval to the Acting Mayor to negotiate and sign a settlement agreement with St. John's Commons.

¹The complaint also addressed various local officials' interests in this matter, including the fact that the Mayor recused himself due to his brother's interest in the property. However, the Open Meetings Compliance Board has no authority to consider matters beyond the Open Meetings Act. Thus, in submitting the complaint to the City Council for response, we advised that we would not address any conflict of interest issues raised in the complaint. However, we note that the complaint pointed out that, given the special interests of local officials in this matter, it is even more important that the public understand how they voted.

The publicly-available agenda of the regular meeting held November 2, 2009, also reflected a request for a closed session concerning St. John's Commons. The minutes of that day's public meeting indicated that the meeting was closed in accordance with §10-508² to discuss three issues, including "[t]he legal issue concerning St. John's Commons." The response indicated the session involved a discussion between the Council and municipal attorney, including a detailed review of the facts contained in the proposed consent order. The previous action to settle with St. John's Commons was unanimously reaffirmed and approval for the Acting Mayor to sign the consent order was given.

The Council's position is that it properly followed the procedure to go into closed session for a valid purpose – to consult with counsel to obtain legal advice. Minutes were taken, but they remain sealed. The Council further contends that it was also permitted to approve the Acting Mayor settling the legal action in closed session. The response included copies of the agendas and minutes of the public meetings cited above, St. John's Common's complaint filed in the United States District Court for the District of Maryland, the consent decree signed by the Honorable J. Frederick Motz on November 19, 2009, and copies of select correspondence from St. Johns Commons' counsel.

Following receipt of the Council's response, in order to better understand what occurred, we asked Mr. Ishak to provide us with copies of the sealed minutes for the closed sessions³ as well as publicly-available written statements prepared in closing the meetings and subsequent disclosures concerning the closed sessions as reported in publicly-available minutes. Copies of the minutes were provided. As to the written statement required to close a meeting, the response indicated that the necessary information appeared in the agenda. Furthermore, based on a written note or e-mail prepared by the municipal attorney, the information is read into the record as part of the motion in closing the meeting, thus, captured on tape, and then reflected in the minutes. Although the handwritten notes were not retained, the response indicated that, if necessary, a copy of the recording could be produced. The subsequent public disclosures following the closed sessions on

²All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

³Copies of sealed minutes submitted to the Compliance Board remain confidential unless the public body elects to make them public. §10-502.5(c)(2)(iii).

October 19 and November 2 appeared in the minutes approved November 2 and 16, respectively.

II

Analysis

Except as otherwise expressly authorized by the Open Meetings Act, when a public body such as the Havre de Grace City Council conducts a meeting that is governed by the Act, the meeting must be open in order that the public may attend. §§10-505, 10-507(a). However, the Act provides 14 justifications under which a meeting can nevertheless be closed, provided that the procedural requirements of the Act are followed. §§10-506, 10-508 and 10-509. Each exception is to be strictly construed and, during the course of a closed session, members of a public body may not discuss or act on any matter not permitted under one of the Act's exceptions. §10-508(b) and (c).

The Act includes two exceptions pertinent to the closed sessions on October 19 and November 2, 2009, related to the litigation and approval of the consent decree. The Act allows a public body to close a meeting in order to consult with counsel to obtain legal advice. §10-508(a)(7). The Act provides a separate exception that specifically addresses litigation, but in some respects, is broader in scope. It allows a public body to close a meeting to "consult with staff, consultants, or other individuals about pending or potential litigation." §10-508(a)(8). Taken together, we find that the scope of discussions was permissible under these provisions. Clearly, any of the discussions between the Council and its attorney about the merit of the litigation, relevant facts, and details of the proposed consent decree during which the attorney provided guidance would be covered under §10-508(a)(7). To the extent discussions went beyond the attorney offering legal advice, including authorizing the Acting Mayor to sign the consent decree on behalf of the Town, it nonetheless would have been covered by §10-508(a)(8). While one could argue that the final action, *i.e.*, authorization to sign the document on the part of the City, could have been performed in an open session, in our view, the Council did not exceed the scope of the latter provision in acting during the closed session. While the parties may have reached agreement, the litigation was not technically settled until the federal judge signed the order on November 19, 2009. Based on our review of the record, we find no violation as to the substantive allegation in the complaint, *i.e.*, that the Council impermissibly conducted a closed session.

Although we find no substantive violation, we would be remiss if we failed to point out procedural concerns with the Council's process in documenting a closed meeting. Before a closed session, a public body must vote to close a meeting and the presiding officer is responsible for preparation of a written statement documenting the justification for the closed session in accordance with §10-508(d)(2). As long as that document remains accurate at the time of actual closure, we have previously held that the written statement can be prepared in advance of the meeting and included as part of an agenda. 4 *OMCB Opinions* 46 (2004). While the agendas prepared for October 19 and November 2, 2009, suggested the closed session involved legal matters and specifically indicated the issues involved St. Johns Commons, neither document cited the applicable statutory authority under which the meetings would be closed. The statutory reference must reflect the specific provision(s) under §10-508(a) in order that the public can evaluate the stated reason against the applicable statutory provision. *See, e.g., 5 OMCB Opinions* 14, 18-19 (2006). Based on our review of the minutes, it does not appear that this deficiency was corrected as part of the motion to support closure. In any event, an oral statement, even if reflected in the minutes, does not satisfy the requirement for a written statement required under the Act. *See 1 OMCB Opinions* 13 (1992).⁴

Similarly, after a closed meeting, certain information about the closed session must be reported as part of publicly-available minutes. Specifically, the Act provides:

If a public body meets in closed session, the minutes for its next open session shall include:

- (i) a statement of the time, place, and purpose of the closed session;
- (ii) a record of the vote of each member as to closing the session;
- (iii) a citation of the authority under [the Open Meetings Act] for closing the session;
- and

⁴While no specific format is required, we have long recommended that public bodies use the form suggested by the Office of Attorney General intended to assist public bodies comply with the Act in closing a meeting. *See Office of the Maryland Attorney General, Open Meetings Act Manual App. C* (6th ed. 2006), available at <http://www.oag.state.md.us/Opengov/Openmeetings/AppC.pdf>.

(iv) a listing of the topics of discussion, persons present, and each action taken during the session.

§10-509(c)(2). The publicly-available minutes submitted in response to our request failed to satisfy the statutory requirements. Thus, while we find no substantive violation of the Act, we encourage the municipal attorney to review with the Council the Act's procedural requirements pertaining to a closed session, namely, the proper completion of a written statement in advance of a closed session and the required disclosures after a closed session takes place as part of the body's minutes.

III

Conclusion

We find that the Council had a proper basis under the Open Meetings Act to consider the matters that were considered during closed sessions on October 19 and November 2, 2009. However, the Council's procedural practices failed to satisfy the Act's requirements in terms of documenting the closing of the sessions and the subsequent reporting of the closed sessions as part of the Council's publicly-available minutes.

OPEN MEETINGS COMPLIANCE BOARD

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